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No. 98-102

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In The

Supreme Court of the United States

October Term, 1997

PETE LIEN & SONS, INC., a South Dakota corporation doing business in Colorado as Colorado Lien Company,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER; JOHN CLARKE, JANET DUVALL, AND JIM DISNEY, in their Capacity as Members of the Board of County Commissioners of Larimer County, Colorado,

Respondents,

v.

THE SANDY FLATS DEFENSE COALITION, A Colorado Nonprofit Corporation,

Intervenor.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a county's denial of a mining permit under its zoning regulation constitute a categorical taking under the Fifth Amendment to the United States Constitution where: (1) the county denied the applicant's request to mine only one mineral of a severed mineral estate; and (2) the applicant proposed alternative locations and asked the county to select one of two quarries?

Where a county's denial of a mining permit under its zoning regulation does not constitute a categorical taking under the Fifth Amendment to the United States Constitution, may a court properly consider whether the applicant was on notice of the county's regulatory scheme and therefore had no reasonable investment-backed expectation in deciding whether a taking has occurred?

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STATEMENT OF THE CASE

Article 28 of Title 30, C.R.S. 1973 empowers counties to adopt zoning regulations, including classifying land uses, for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state. Section 30-28-111 and 115 C.R.S. 1973.

Pursuant to this statutory authority, Larimer County, Colorado, enacted a Comprehensive Zoning Resolution and established zoning districts. The Resolution lists uses for each district which are permitted outright and lists other uses which are permitted by special review. Because special review uses are generally more adverse to the surrounding area, the Board of County Commissioners ("County Board") may approve such uses only after a public hearing.

The special review procedures allow the County Board to consider such uses in detail. The Zoning Resolution lists the following eight factors which the County Board must consider when deciding whether to grant a special review use:

1. Whether the proposal complies with the intent and purposes of the Resolution, and whether it complies with the intent and purposes of any comprehensive plan enacted by a governmental authority affecting the property in question.

2. Whether or not the proposal is harmonious with the surrounding neighborhood.

3. The general effect the proposal may have on the neighborhood.

4. The general effect the proposal may have on property values.

5. Whether or not the proposal would impair the public health, welfare, prosperity and safety by creating undesirable traffic congestion, undesirable sanitary conditions, overburdening of utilities or adverse environmental influences in the area.

6. The recommendation, if any, from an appropriate planning or other agency of a governmental unit near the property in question.

7. The anticipated time table for completion of the proposed use.

8. Whether or not the procedural requirements for reviewing special review items have been complied with.

The County Board **must** deny a special review use if it finds it is probable that the proposed use will be contrary to the public interest by being a nuisance, or otherwise by being dangerous, detrimental or injurious to nearby residences, properties, or businesses. The County Board **may** deny a special review use if it finds the proposed use is contrary to expressed programs of neighborhood conservation or improvement, either residential or non-residential.

In May 1989, Pete Lien & Sons, Inc. ("Lien") applied to the County Board to operate a silica sandstone quarry ("the Weaver Quarry") on ten acres in Larimer County. The Weaver Quarry is located in the O-Open Zone. Mining is a special review use in the O-Open Zone. The County Board approved Lien's application.

In 1991, Lien applied to expand the Weaver Quarry to mine an additional 39 acres. The 39 acres included unpatented federal mining claims. The County Board denied Lien's application to expand because the quarry would have an adverse visual impact on the foothills.

Lien appealed the County Board's decision to the state district court. Lien contended, in part, that the County Board had no authority to prohibit it from mining the area upon which federal minerals were located because the Federal Mining Law of 1872 preempted local regulations. The state district court agreed and the Colorado Court of Appeals affirmed the district court's decision as to the federal mineral issue in an unpublished opinion.

In 1994, Lien entered into a lease with Rock Springs Royalty Company. Rock Springs is the owner of the entire mineral estate in 640 acres of land in the O-Open Zone known as Sandy Flats. The lease however, allowed Lien to mine only one mineral within the mineral estate – silica sandstone.

Lien applied to the County Board for a special review permit to mine the sandstone at Sandy Flats on 45 acres over a period of 23-28 years. The County Board considered the application at a public hearing and denied the application. The Sandy Flats application is the subject of this petition.

Sam Lien, Lien's president and general manager, testified at the public hearing that Lien proposed to mine Sandy Flats in response to the prior County Board's suggestion that Lien look for an alternative quarry site which would be less visible than Weaver. Sam Lien further

testified that if the County Board approved Sandy Flats, Lien would close Weaver within the following year; if the County Board did not approve Sandy Flats, Lien would continue to operate Weaver:

> It all comes back, in my mind, to the issue that there's a choice to be made tonight around opening up a new quarry at Weaver this summer or a new quarry at Sandy Flats and reclaiming Weaver.
>
> I've honored my word to the Commission to present this alternative, and I've tried to do my best to make it as easy as possible on our neighbors at Sandy Flats, and I'm asking you tonight which choice is to be made.

Many area residents appeared and testified in opposition to Sandy Flats. Residents clearly preferred Lien remain at the existing Weaver Quarry rather than opening an entirely new quarry at Sandy Flats.

When the County Board denied Sandy Flats, it responded to Lien's request that the Board choose one site where Lien should mine. By its decision, the County Board told Lien it should remain at the Weaver site rather than opening a new site at Sandy Flats.

Lien appealed the County Board's denial to the state district court and Court of Appeals. Lien claimed, *inter alia*, that the County Board's denial constituted a taking of Lien's property in violation of the Colorado and United States Constitutions. Both Courts, relying on well-settled law, rejected Lien's takings claim. The Colorado

Supreme Court denied certiorari review of Lien's takings claim.

ARGUMENT

I. THE COLORADO COURT OF APPEAL'S DECISION IS CONSISTENT WITH UNITED STATES SUPREME COURT DECISIONS.

A. Lien has not suffered a categorical taking and *Lucas* is inapplicable.

The threshold question to be answered before *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), can be applied is whether a categorical taking has occurred. *Lucas* describes two instances where a categorical taking occurs: (1) where a regulation compels the property owner to suffer a physical invasion of his property; and (2) where a regulation denies a property owner of all economically beneficial or productive use of his land, unless the proscribed use was not part of the property owner's title to begin with.

Lien inaccurately describes its property interest as "a severed mineral estate," (Petition, page 4), and then argues that denial of the Sandy Flats application was a categorical taking of the entire mineral estate. Lien's claim that the County Board's denial of its special review application to mine silica sand is a categorical taking is wrong for a number of reasons.

First, Lien's property interest is comprised of a lease to mine only one mineral in the entire mineral estate. All

other minerals and hydrocarbons are unaffected by the county action under review.[1]

Second, Lien's application is to mine forty-five acres out of a six hundred forty acre severed mineral estate. The remaining five hundred ninety-five acres are unaffected by the action under review.

Third, Lien's application was to mine silica sand on either Sandy Flats or the Weaver quarry. Lien intended to mine but a single quarry. Lien's intention has not been thwarted by the action under review.

Finally, the denial of Lien's Sandy Flats application speaks as of the time of the decision. There is no prejudice to future applications should other uses, roads, or other conditions in the area change to justify a different result.

This Court can only consider Lien's categorical taking claim if Lien is allowed to separate the total severed mineral estate into discrete parts, accompanied by the determination that a single discrete part has been taken. This Court has soundly rejected this reasoning.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court clarified it was appropriate to consider the entire property. In response to the appellants' argument New York City's landmarks ordinance took their rights to the superadjacent air space above Grand Central Station, this Court stated:

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[1] The record is void of any evidence that other minerals and hydrocarbons contained within the mineral estate cannot be mined.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and the nature and extent of the interference with the rights in the parcel as a whole – here, the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130-31.

Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court recognized, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Id.* at 497 (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)). In applying this principle in *Keystone*, this Court specifically rejected the contention the regulation entirely destroyed the petitioner's interest in Pennsylvania's unique support estate. *Id.* at 498-99. "It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500.

Subsequent to *Lucas*, this Court reaffirmed the principle that the entire property must be considered to determine if a taking has occurred. In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for*

Southern California, 508 U.S. 602 (1993), this Court rejected an attempt to "shoehorn its claim into [*Lucas*' total takings] analysis by asserting that '[t]he property of [Concrete Pipe] which is taken, is taken in its entirety.' " *Id.* at 643-44. After noting it had previously rejected this analytical framework in both *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court declared:

> To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question."

Concrete Pipe, 508 U.S. at 644.

The denominator being the entire property interest, and not a discrete part, is firmly settled in all courts.[2]

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[2] See, e.g. *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (in rejecting takings analysis narrowly focused on the right to hunt, the court noted, "we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land."); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority."); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430 (10th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 951 (1987) ("in determining whether a particular land-use regulation deprives a property owner of the 'economically viable use' of his land, the court must examine the impact of the regulation on the property as a

Certiorari need not be granted to further explain this issue. Consistent with this Court's decisions, Colorado courts hold that parcels of property cannot be divided into individual strands in the bundle of property rights for takings analysis.[3]

Once the proper denominator is used, this becomes a relatively simply analysis. The denominator is the property as a whole including both the surface and subsurface estates.[4] Even if a severed mineral estate can be deemed to be the property interest for takings analysis, Lien's

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whole."); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985) ("[i]t is well settled that taking jurisdiction does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated.").

[3] In *Central Colorado Water Conservancy District v. Simpson, State Engineer*, 877 P.2d 335 (Colo. 1994), the court, citing *Penn Central* and *Keystone*, concluded, "to determine whether a taking has occurred for purposes of federal takings analysis, the impact on the challenged action on the property as a whole must be considered." 877 P.2d at 347. The Colorado Court of Appeals in *Williams v. City of Central*, 907 P.2d 701, 704 (Colo. App. 1995), described its takings analysis as follows:

> Generally, to determine whether there has been a denial of all use of a landowner's property, a court must compare the value that has been taken from the property to that which remains; the interference with rights in the discrete segment of the property affected is measured against the value of the property as a whole.

[4] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court refused to consider the right of support, a separate property interest under Pennsylvania law, as a separate property interest for a taking claim.

property interest is only one segment in the mineral estate. The County Board's denial of Lien's special review application only precludes Lien from mining one mineral in an area comprising less than ten percent of the total severed mineral estate under the specific terms of the particular mining plan presented for the County Board's consideration.

The land use decision at issue here focused only on the adverse impacts of Lien's proposal. On the other hand, the land use decision in the typical takings case (wetlands for example) is intended to permanently preserve the property interest at issue for a public benefit (wetlands not being destroyed through development). Because the action under review here is without prejudice to a future application, no permanent taking in the wetlands sense has occurred here.

B. Knowledge of the County Board's regulatory authority is relevant to whether Lien had a reasonable investment-backed expectation.

Having established that Lien's claim does not fall within the *Lucas* total takings categorical rule, the traditional ad-hoc, multi-factorial factual inquiry analysis applies. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Among the factors considered by this Court and federal and state courts in this ad-hoc analysis are the character of the governmental action, its economic impact, and the extent to which the government action interfered with a property owner's reasonable investment-backed expectation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S.

177, 190-91 (1985). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This Court has held that the force of the third factor – the property owner's reasonable investment-backed expectation may be "so overwhelming . . . that it disposes of the takings questions." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Whether a property owner is on notice of the extent of the government's regulatory authority over its property is directly relevant to whether the property owner's expectations were reasonable. *Monsanto*, 467 U.S. at 1006 (no reasonable investment-backed expectations that data submitted to EPA would be kept confidential because Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration).[5]

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[5] *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454-455 (2d Cir. 1995) (no reasonable investment-backed expectation existed when company continued as an insured depository institution subject to new federal law on cross-guarantee liability); *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1072, *cert. denied*, 513 U.S. 961 (1994) (highly regulated nature of the banking industry dispositive of the taking issue); *Kesserling v. F/T Arctic Hero*, 30 F.3d 1123, 1126 (9th Cir. 1994) (judicial enforcement of crewperson's wage liens did not interfere with the owner/lessor of the vessel's fishing equipment's reasonable investment-backed expectations because owner presumed to have knowledge third-party equipment was subject to maritime liens); *California Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 916 (1992) (no taking present based on lack of reasonable investment-backed expectations of savings and loan owner because of the applicable regulatory regime).

The Colorado Supreme Court and Colorado Court of Appeals have followed the United States Supreme Court in adopting a similar rule concerning the investment-backed expectations of property holders for ad-hoc takings analysis. In *State Department of Health v. The Mill*, 877 P.2d 993 (Colo. 1994), the Colorado Supreme Court addressed whether the applicable federal and state regulations' restrictions on a former uranium mine and mill tailings storage site constituted a regulatory taking. In analyzing the issue, the court stated, "[t]he 'reasonable investment-backed expectations' of the regulated party is the dispositive factor in takings analysis when the regulated party is 'on notice' of the extent of the government's regulatory authority over the property." *The Mill*, 887 P.2d at 1000. A property holder's "expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment." *Id.* Ultimately, the court held no taking had occurred because the owner's expectations for using its property were unreasonable. *Id.* at 1002.

Following *The Mill*, the Colorado Court of Appeals has applied this rule in the context of a zoning ordinance which required special review for certain uses. In *Williams v. City of Central*, 907 P.2d 701 (Colo. App. 1995), the landholder alleged he suffered a temporary taking when the city enacted a development moratorium and suspended his application for a special review permit required for him to conduct limited stakes gambling on his property. 907 P.2d at 702-03. In analyzing the takings claim, the court discussed the impact of Williams' notice of the city's zoning ordinances. The court concluded he was "on notice" his property "was subject to special use

review and approval in the discretion of Central City." *Id.* at 707. Further, "[h]e was also 'on notice' that all other commercial uses were subject to the special review process." *Id.* As a result of this knowledge, the court concluded any expectation a special review permit would be granted was not a reasonable investment-backed expectation. *Id.* Instead, the court found "the intended ultimate use of limited stakes gambling was speculative at best." *Id.*

Consistent with the decisions of this Court and prior Colorado decisions, the Colorado Court of Appeals correctly held that Lien's knowledge of the County's special review regulations disposed of Lien's takings claim under an ad-hoc analysis.

The authorities Lien cites in support of the position that prior notice is not a consideration all relate to categorical takings situations. *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (Fla. App. 1992) (owner left with no viable use of land, use of land was limited to recreation or "just looking at it."); *Lopes v. City of Peabody*, 417 Mass. 299 (1994), 629 N.E.2d 1312 (Mass. 1994) (all economically viable use eliminated because of wetlands); *Moroney v. Borough of Old Tappan*, 633 A.2d 1045 (N.J. App. 1993) (denial of right to build home deprived owner of all economic use of property. The analysis is fact intensive and burden of showing no economic use lies with landowner. Court specifically upheld the use of reasonable investment-backed expectation criteria when no categorical taking has occurred); *K&K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 (1996) (all economic use destroyed because of refusal of a wetlands fill permit.);

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (taking of a reversionary interest in a railroad easement under Rails-to-Trails act is a total taking).

By definition, the traditional ad-hoc, multifactorial, factual inquiry applicable to noncategorical takings cases like this one involves a case-by-case determination. This may lead to differing outcomes depending on the facts of the case and the weight given by a particular court to each of the applicable factors (i.e., the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations). Such differing outcomes by courts of various states is consistent with the United States Supreme Court's pronouncement that "[i]n 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad-hoc, factual inquiries.' " *Lucas*, 505 U.S. 1003 at 1015.

II. REASONS FOR DENYING THE WRIT

This case is not worthy of certiorari review by this Court. The law is well settled that a categorical taking occurs only when a regulation denies a property owner all economically viable use of his property and that a property cannot be split into discrete segments for takings analysis. This is not a categorical takings case and the Court need not revisit this issue.

Because this is not a categorical takings case, the Colorado Court of Appeals, consistent with federal and state law, applied the ad-hoc, multifactorial factual inquiry. The Court properly held that Lien could not have

a reasonable investment-backed expectation to mine silica sand in light of the County's discretionary special review process.

The County's denial of Lien's application was a fact intensive proceeding based on a proposal to mine at a particular location in a particular method. The County Board determined this proposal to be against the health, safety and welfare of its citizens. Lien asked the County Board to choose one site – the Weaver quarry or Sandy Flats quarry. The County Board chose Weaver. The qualified nature of Lien's application precludes Lien from asserting a takings claim. The unique facts of this case mean that if certiorari were granted, any rule of law would be of little precedential value.

CONCLUSION

For the reasons given above, Lien's petition for certiorari should be denied.

Respectfully submitted,

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